

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,

Plaintiffs,

v.

GINA MCCARTHY, in her official capacity as
 Administrator of the United States
 Environmental Protection Agency,

Defendant.

Case No.: 14-CV-05091 YGR
And consolidated case 14-cv-3198-YGR

**ORDER GRANTING IN PART MOTIONS AND
 CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Plaintiffs Sierra Club and Wild Earth Guardians (“Plaintiffs”) filed a Clean Air Act citizen suit to compel Defendant Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency (“EPA”) to undertake mandatory duties for which statutory compliance deadlines had passed. (*Sierra Club v. McCarthy*, 14-cv-5091-YGR, complaint filed November 18, 2014 [“the ‘5091 Action’”].)¹ Specifically, Plaintiffs sought an order

¹ On July 15, 2014, Plaintiff Sierra Club filed a complaint against EPA alleging in Claim 1 that Tennessee had not submitted a 110(a)(2)(D)(i)(I) element of a 2008 ozone National Ambient Air Quality Standards Infrastructure State Implementation Plan, and in Claim 2 that EPA had failed to take Final Action on the States Infrastructure State Implementation Plan Submittals for the States of Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Maryland, Mississippi, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Virginia, West Virginia as required. *See* 42 U.S.C. § 7410(k)(2) - (4). (*Sierra Club v. McCarthy*, 14-cv-3198-YGR [“the ‘3198 Action’”].)

The Court consolidated the ‘5091 Complaint and the ‘3198 Complaint for decision on May 7, 2015. (*See* Docket in ‘5091 Action at Dkt. No. 38.)

The parties have submitted a proposed form of Partial Consent Decree on the ‘3198 Action’s Claim 2. (*See* Docket in ‘3198 Action at Dkt. No. 49.) Thus, the only remaining claim at issue in the ‘3198 Action is against the state of Tennessee for the identical Good Neighbor SIP violation alleged against 25 other states in the ‘5091 Action.

1 that EPA be required to fulfill certain non-discretionary duties under 42 U.S.C. section
2 7410(a)(2)(D)(i)(I) of the Clean Air Act (“CAA”), referred to as the “Good Neighbor” provisions,
3 with respect to the states of Arkansas, California, Connecticut, Georgia, Iowa, Illinois, Kansas,
4 Massachusetts, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Mexico, Oklahoma,
5 Pennsylvania, Rhode Island, South Carolina, Virginia, Washington, and West Virginia.
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7 On January 16, 2015, in the ‘5091 Action, Plaintiffs filed a Motion for Summary Judgment,
8 seeking entry of an order declaring that EPA had failed to make the required finding of failure to
9 submit a Good Neighbor State Implementation Plan (or “SIP”) for the 2008 ozone National
10 Ambient Air Quality Standard (“NAAQS”), and order EPA to do so within thirty days. (‘5091
11 Action, Dkt. No. 21.) Previously, on January 5, 2015, Plaintiff Sierra Club had moved for
12 summary judgment in the now-related and consolidated ‘3198 Action on Claim 1 therein, seeking
13 the identical relief with respect to the state of Tennessee. (‘3198 Action, Dkt. No. 35.) EPA, in its
14 cross-motion and response to those motions, conceded liability but argued that it would need ninety
15 days to comply with those mandatory duties.
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17 Having carefully considered the arguments and papers submitted, and in light of the parties’
18 substantial agreement as to the facts herein, the Court finds that there is no triable issue of material
19 fact and **GRANTS IN PART** Plaintiffs’ motion for summary judgment in the ‘5091 Action and in the
20 ‘3198 Action and **ORDERS** that EPA comply with its statutory obligations under 42 U.S.C. section
21 7410(a)(2)(D)(i)(I) with respect to the states of Arkansas, California, Connecticut, Georgia, Iowa,
22 Illinois, Kansas, Massachusetts, Maine, Michigan, Minnesota, Missouri, New Hampshire, New
23 Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Washington,
24 and West Virginia no later than **June 30, 2015**.
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I. STATUTORY OVERVIEW OF THE CLEAN AIR ACT

Under the CAA, EPA is required to set the NAAQS for certain pollutants, including ozone. 42 U.S.C. § 7409(a). Within three years of promulgating the ozone NAAQS, the CAA requires each state to submit a SIP that provides for the “implementation, maintenance, and enforcement” of the standard. 42 U.S.C. § 7410(a)(1). Each SIP is required to contain a “Good Neighbor” provision, which prohibits the state from emitting air pollutants which will contribute significantly to nonattainment, or interference with maintenance in other states. 42 U.S.C. § 7410(a)(2)(D)(i)(I). The CAA requires EPA to determine whether each SIP submitted is administratively complete. 42 U.S.C. § 7410(k)(1)(B).

II. FACTUAL BACKGROUND

EPA promulgated a NAAQS for ozone on March 12, 2008. 73 Fed. Reg. 16436 (Mar. 27, 2008). Each state was required to submit its SIP for the 2008 ozone NAAQS by March 12, 2011. 42 U.S.C. § 7410(a)(1). For states that failed to meet that deadline, EPA was required to issue a notice of failure to submit by the September 12, 2011.

On October 17, 2012, this Court found that EPA failed to meet that deadline in violation of its nondiscretionary duties under the CAA. *WildEarth Guardians v. Jackson*, No. 11-CV-05651-YGR, Order Granting In Part Plaintiffs’ Motion for Summary Judgment, and Granting Defendant’s Cross-Motion for Summary Judgment, Dkt. No. 64 (Oct. 17, 2012). The Court also found that, for certain states which submitted an SIP after the deadline, EPA had failed to take final action by approving in full, disapproving in full, or approving in part and disapproving in part, within the time required by statute. *Id. citing* 42 U.S.C. § 7410(k)(2),(3). Therefore, this Court required EPA to issue findings that certain states had failed to submit SIPs for the 2008 ozone National Ambient Air Quality Standard by no later than January 4, 2013.

1 On January 4, 2013, pursuant to this Court's order, EPA issued a finding that numerous
2 states had failed to submit 2008 ozone SIPs except as to the "Good Neighbor" provisions found in
3 42 U.S.C. § 7410(a)(2)(D)(i)(I). Findings of Failure To Submit a Complete State Implementation
4 Plan, 78 Fed. Reg. 2882 (Jan. 15, 2013). EPA declined to make findings of failure to submit on the
5 Good Neighbor provisions in reliance on its interpretation of the D.C. Circuit's decision in *EME*
6 *Homer City Generation v. EPA*, 696 F.3d 7, 31 (D.C. Cir. 2012), concluding that "a SIP cannot be
7 deemed to lack a required submission or deemed deficient for failure to meet the 110(a)(2)(D)(i)(I)
8 obligation until after the EPA quantifies that obligation." Findings of Failure To Submit a
9 Complete State Implementation Plan, 78 Fed. Reg. at 2884.
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11 Since then, the Supreme Court reversed the D.C. Circuit decision in *Homer City*, holding
12 that the plain language of the Clean Air Act mandated that states submit Good Neighbor provisions
13 within three years of EPA promulgating a NAAQS, and that EPA need not undertake any action to
14 trigger this obligation. *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014).
15 In light of the *Homer City* opinion, on August 1, 2014, the D.C. Circuit vacated EPA's January 4,
16 2013 determination that it need not address the Good Neighbor provisions, and remanded the
17 matter to EPA for further consideration. *See Maryland v. EPA*, 13–1070, Order, Dkt. No. 1505606,
18 at 1 (D.C. Cir. Aug 1, 2014). Subsequent to the D.C. Circuit's vacating EPA's January 4, 2013
19 determination, EPA has done nothing to cure its failure to address its Good Neighbor provision
20 duties, despite requests for action by Sierra Club, Environmental Defense Fund, the States of
21 Maryland, Connecticut, and Delaware, and the District of Columbia.
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25 The following states have not submitted Good Neighbor provisions in compliance with
26 section 110(a)(2)(D)(i)(I) of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I), for the 2008 ozone
27 NAAQS: Alabama, Arkansas, California, Connecticut, Florida, Georgia, Iowa, Illinois, Kansas,
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1 Massachusetts, Maine, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico,
2 North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia,
3 Washington, and West Virginia. EPA has not issued a finding of failure to submit a completed SIP
4 as required under the CAA for any of these states.

5 **III. LEGAL STANDARD**

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7 Summary judgment is proper where there is “no genuine issue as to any material fact and
8 that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

9 When an agency fails to meet its statutorily mandated deadline, the district court has broad
10 discretion to fashion an equitable remedy. *Alaska Ctr. for Env’t v. Browner*, 20 F.3d 981, 986 (9th
11 Cir. 1994) (recognizing that “to bring about any progress toward achieving the congressional
12 objectives of the [Clean Water Act], the EPA would have to be directed to take specific steps”).
13 The court’s discretion is guided by Congress’ express intent. *See Delaney v. EPA*, 898 F.2d 687,
14 695 (9th Cir. 1990) (disapproving of the extensions EPA gave to delinquent nonattainment areas to
15 attain NAAQS because it contradicted Congress’ intent to achieve the NAAQS “as soon as
16 possible”); *Sierra Club v. Thomas*, 658 F. Supp. 165, 172 (N.D. Cal. 1987) (“[I]f the statutory
17 deadline has passed by the time the court issues its decree, the EPA remains obligated to issue
18 regulations within the time frame mandated by Congress.”).

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21 The agency bears a heavy burden to show that such a statutory deadline cannot be met.
22 *Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979). Mere apprehension that the
23 agency cannot meet a deadline is not enough. *Id.* The agency can prove that a deadline is
24 infeasible by demonstrating either: (1) the “budgetary” and “manpower” demands required are
25 “beyond the agency’s capacity or would unduly jeopardize the implementation of other essential
26 programs”; or (2) and agency’s need to have more time to sufficiently evaluate complex, technical
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1 problems. *Natural Res. Def. Council v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1974) (providing the
2 possibility of an extension subsequent to the court-ordered deadline).

3 **IV. DISCUSSION**

4 All parties agree that summary judgment is appropriate because there is no genuine dispute
5 of material fact. EPA does not dispute Plaintiffs' allegations that the requirements of the Good
6 Neighbor provision are non-discretionary, and that EPA has not issued the required failure to
7 submit findings as to the identified states' SIPs. The only issue remaining for decision is what
8 deadline the Court will impose for EPA's compliance with its mandatory duty. Plaintiffs request a
9 thirty-day deadline and EPA requests a ninety-day deadline.
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11 Plaintiffs argue that thirty days is appropriate for two main reasons: (1) making the failure
12 to submit finding is a simple, rote task that does not involve any technical or policy judgments; and
13 (2) EPA has been on notice that these findings are required since the *EME Homer* decision. EPA
14 requests ninety days from the Court's order to comply with the statutory requirements. EPA argues
15 that a thirty-day deadline is infeasible because of other competing obligations that prevent it from
16 streamlining the failure to submit findings. EPA claims that its other priorities include: (1) seventy-
17 eight upcoming air program projects listed on EPA's Regulatory Agenda; (2) thirty-nine other
18 deadlines; (3) a heavy workload related to its review and action on SIP submissions; (4) defending
19 the Cross-State Air Pollution Rule (the "Transport Rule"); and (5) responding to approximately
20 sixty pending administrative petitions for reconsideration requesting that EPA reconsider numerous
21 aspects of the Transport Rule. (Defendant's Oppo. at 8–10.)
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25 The Court finds that it is reasonable for EPA to issue its failure to submit findings for the
26 incomplete SIPs no later than June 30, 2015. Under the CAA, EPA must determine if the
27 submitted SIP is administratively complete within 60 days. 42 U.S.C. § 7410(k)(1)(B) ("Within 60
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1 days of the Administrator's receipt of a plan or plan revision . . . the Administrator shall determine
 2 whether the minimum criteria . . . have been met."'). Moreover, EPA has known for quite some
 3 time which states failed to comply with the Good Neighbor provisions. EPA's argument that 90
 4 days is the "most expeditious schedule under which EPA could sign a notice of making findings for
 5 failure to submit," is belied by the fact that it has known that this action was required for over *nine*
 6 *months*. In this case EPA admits liability and offers no reason for its inaction. Accordingly, it is
 7 appropriate to require both expeditious and reasonable attention to this matter.
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9 CONCLUSION


10 For the foregoing reasons, it is **ORDERED** that Plaintiffs' Motion for Summary Judgment
 11 and Defendant's Cross-Motion for Summary Judgment are **GRANTED IN PART** and **DENIED IN**
 12 **PART**. Defendant EPA shall issue its failure to submit findings for the above mentioned twenty-
 13 five states that have failed to include a Good Neighbor provisions for the 2008 ozone NAAQS in
 14 their SIPs by **June 30, 2015**.
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16 No later than **May 14, 2015**, the parties shall submit a proposed form of judgment for the
 17 consolidated actions which addresses and incorporates *both* the June 30, 2015 deadline for
 18 compliance on the failure to submit 2008 ozone NAAQS Good Neighbor provisions decided
 19 herein, and the terms of the Partial Consent Decree submitted on April 22, 2015, in the '3198
 20 Action ('3198 Action at Dkt. No. 49) in a single form of judgment covering all claims.
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22 This terminates Docket No. 21.

23 **IT IS SO ORDERED.**

24 Date: May 7, 2015

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 26 YVONNE GONZALEZ ROGERS
 27 UNITED STATES DISTRICT COURT JUDGE
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